NO. 81-6891

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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LESLIE R. JONES,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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# SUPPLEMENTAL BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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## PREFATORY STATEMENT

**This Supplemental Brief is being filed pursuant to Supreme Court Rule 22.6. Petitioner's Motion for Leave to Proceed in Forma Pauperis, and supporting affidavit, were filed with his Petition for Writ of Certiorari on June 7, 1982.**

## REASONS FOR GRANTING WRIT

### QUESTION PRESENTED

### QUESTION

**IMPOSITION OF THE DEATH PENALTY, BASED IN PART UPON AGGRAVATING CIRCUMSTANCES FOUND BY THE TRIAL COURT IN A SUBSEQUENT PENALTY PROCEEDING, WHERE THE SAME AGGRAVATING CIRCUMSTANCES WERE EXPRESSLY FOUND NOT TO EXIST IN AN EARLIER PENALTY PROCEEDING, IS VIOLATIVE OF THE GUARANTEE AGAINST DOUBLE JEOPARDY PROVIDED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND MADE APPLICABLE TO THE STATES BY THE FOURTEENTH AMENDMENT.**

On June 14, 1982, this Court granted certiorari in Estelle v. Bullard (case no. 81-1774). The Fifth Circuit Court of Appeals held in Bullard v. Estelle, 665 F.2d 1347 (5th Cir. 1982) that the Double Jeopardy Clause barred the State of Texas from affording itself a second opportunity to prove the facts necessary to enhance a defendant's punishment, under that state's habitual offender sentencing procedure, where the state had offered insufficient evidence of these facts at an earlier penalty proceeding.

In Cooper v. State, __ So.2d __ (Tex. 1982) (en banc) (31 Crl. 2217) the Texas Court of Criminal Appeals adopted the reasoning of Bullard v. Estelle, supra. While expressly noting that it was not bound by the constitutional interpretation of the Fifth Circuit, the Texas Court found Bullard persuasive, and held that as a matter of federal constitutional law the state is not entitled to a second opportunity to prove its enhancement allegations. Both the Cooper and Bullard decisions relied heavily on this Court's opinion in Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. ___, 68 L.Ed.2d 270 (1981).

The constitutional issue before this Court in Estelle v. Bullard, supra, is in some ways identical to the issue in the present case, and in some ways profoundly different. In the present case, the state afforded itself the opportunity to prove certain aggravating circumstances at a second capital sentencing proceeding (necessitated by petitioner's successful appeal of his original conviction), which the trial judge at the original penalty proceeding expressly found not to exist. Whatever this Court decides

in Estelle v. Bullard, supra, will undoubtedly be applied by analogy, by attorneys and judges, to death penalty cases. As noted in the Petition for Writ of Certiorari in the present case, at pages 6-7, issues of this nature will arise frequently in death penalty cases. It is therefore submitted that the present case, or one like it, would make an appropriate "companion case" to Estelle v. Bullard, supra.[1] This would enable the Court to consider the issue in fuller context, and would help clarify the law in this area. [Compare State v. Silhan, 275 SE.2d 450, 482 (N.C. 1981), with Zant v. Redd, 290 SE.2d 36 (Ga. 1982)].

[1] On the other hand, Bullington v. Missouri, supra could be interpreted broadly enough to support the conclusion that this Court has already considered and ruled on the double jeopardy issue in the death penalty context. In that event, petitioner would request that this Court remand this case to the Florida Supreme Court for reconsideration in light of Bullington.

## CONCLUSION

WHEREFORE, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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